Filed 10/14/20 Licon v. Carfax CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

LEONARD D. LICON, Plaintiff and Appellant, v. CARFAX, INC., Defendant and Respondent.	C089882 (Super. Ct. No. SCCVCV20181087)

In 2016, plaintiff purchased a 2006 Honda Pilot from a used car dealer. According to his complaint, in deciding to purchase the vehicle, plaintiff relied on a vehicle history report prepared by defendant Carfax, Inc. That report stated that no open recalls had been reported to defendant. Plaintiff subsequently learned that Honda had issued two airbag-related recalls prior to his purchase of the vehicle. Thereafter, plaintiff commenced this action against defendant, asserting causes of action sounding in fraud and breach of contract. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer without leave to amend and dismissed the complaint.

Plaintiff asserts the trial court erred in sustaining the demurrer because: (1) it ignored his motion to strike and defendant failed to comply with the meet-and-confer requirements set forth in Code of Civil Procedure section 430.41, subdivision (a),[1] and (2) both his fraud claim and his breach of contract claim stated facts sufficient to constitute a cause of action.

We conclude that, based on the plain language of section 430.41, subdivision (a), a failure by a defendant to satisfy that statute's meet-and-confer requirements does not constitute grounds to overrule the demurrer. Further, the trial court correctly determined that plaintiff's complaint failed to state facts sufficient to constitute a cause of action. As for the fraud claim, the complaint did not state facts sufficient to establish misrepresentation, concealment, or justifiable reliance. As for the contract claim, the complaint did not allege facts sufficient to establish the existence of an express or implied contract.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

Plaintiff filed a complaint against defendant, using Judicial Council Form PLD-C-001, asserting causes of action sounding in fraud and breach of contract.

In his fraud cause of action, plaintiff asserted that defendant's intentional or negligent misrepresentation was that "the 2006 Honda Pilot SUV vehicle . . . for which defendant completed its vehicle history report . . . reflecting no airbag deployment had no open Honda manufacturer airbag recalls *reported to defendant*." (Italics added, capitalization omitted.) Plaintiff further alleged that this representation was false because Honda had issued two recalls prior to the time when defendant prepared the vehicle

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[1] Further undesignated statutory references are to the Code of Civil Procedure.

history report. Plaintiff alleged that when defendant made its misrepresentations, defendant knew they were false. Plaintiff further alleged that defendant concealed or suppressed material facts in that there were Honda airbag recalls applicable to the vehicle. Plaintiff maintained that defendant was "bound to disclose" these material facts, and that it concealed or suppressed them with the intent to defraud and to prevent plaintiff from discovering them. Plaintiff alleged that he justifiably relied on defendant's conduct in that he purchased the vehicle which had defective airbags "subject to rupture that could result in injury or death to the vehicle occupants . . . ." (Capitalization omitted.) As for damages, plaintiff asserted that he spent $19,951 on the vehicle, including "inflated interest," and additionally he had "suffered extreme emotional worry and distress by exposing [himself] and his passengers to the risk of serious injury and death." (Capitalization omitted.)

In an attachment for exemplary damages in connection with his cause of action sounding in fraud, plaintiff stated that defendant "caused to be prepared a vehicle history report for a 2006 Honda Pilot . . . which intentionally misrepresented and concealed that there were no recalls by Honda for the vehicle's defective . . . airbags and for which there had actually been two, and that given the age of that vehicle subject to rupture of their inflators exposing a driver and his passengers to the risk of serious harm or death." (Capitalization omitted.) Plaintiff further alleged that he purchased the vehicle on the basis of defendant's vehicle history report, and that, "not only was [he] deprived of his purchase payment and inordinately high interest rate but . . . also exposed . . . hi[m] and his passengers [to] serious injury and death." (Capitalization omitted.)

In his breach of contract cause of action, plaintiff asserted that a "vehicle history report agreement was made between" plaintiff and defendant. (Capitalization omitted.) As to the terms of the purported agreement, plaintiff alleged: "Plaintiff was purchaser of the Honda Pilot SUV . . . for which the vehicle history report was prepared by defendant and all terms of which applied to the parties and the obligations of the vehicle history

report." (Capitalization omitted.) Plaintiff further alleged defendant breached the agreement by "fail[ing] in its obligation to check for open recalls as to airbags of which there were 2 and involved the manufacturer Honda of the Pilot SUV . . . and rendered the subject vehicle unsafe by having defect[ive] airbag[s] with inflators subject to rupture." (Capitalization omitted.)

Plaintiff included as an exhibit to his complaint a copy of the CARFAX Vehicle History Report. The report stated: "CARFAX Report Provided By: World Famous Autos."[2] It also stated: "This CARFAX Vehicle History Report is based only on information supplied to CARFAX and available as of 12/19/16 at 5:57:36 PM (EST). Other information about this vehicle, including problems, may not have been reported to CARFAX. Use this report as one important tool, along with a vehicle inspection and test drive, to make a better decision about your next used car." In a field on the report explicitly devoted to manufacturer recalls, the report stated: "No open recalls reported to CARFAX. Check with an authorized Honda dealer for any open recalls." In each column of information related to the two previous owners, the report indicated: "No open recalls reported" Above the signature lines for the customer and dealer signatures, the report stated: "CARFAX depends on its sources for the accuracy and reliability of its information. Therefore, no responsibility is assumed by CARFAX or its agents for errors or omissions in this report. CARFAX further expressly disclaims all warranties, express or implied, including any implied warranties of merchantability or fitness for a particular purpose." (Capitalization omitted.)

Defendant's Demurrer

Defendant demurred, asserting that the complaint failed to plead facts sufficient to state a cause of action. (§ 430.10, subd. (e).) Defendant asserted the complaint

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[2] World Famous Autos is the used car dealer from which plaintiff purchased the vehicle. It is not a party to this appeal.

"completely misrepresents the report upon which both . . . claims are based." Defendant emphasized that the vehicle history report stated: " 'no open recalls *reported* to CARFAX." Defendant further emphasized that the vehicle history report advised any interested party to check with an authorized Honda dealer to determine whether there were any open recalls. Defendant asserted that, "[c]ontrary to Plaintiff's allegations, the [vehicle history report] does not state that no recalls were ever issued for the Vehicle, nor does it state that there [were] no open recalls at all." (Fn. omitted.)

Defendant asserted the fraud cause of action was not pled with the required specificity and particularity.

Defendant further argued that the complaint failed to state a cause of action for intentional or negligent misrepresentation. While plaintiff alleged that defendant " 'intentionally misrepresented and concealed that there were no recalls by Honda . . . when there had actually been two,' " plaintiff could not establish that the vehicle history report contained misrepresentations known to defendant to be false, or that defendant knew information in the report was false, because the report "does not say what Plaintiff says it does." Defendant reiterated that the report did not say that there were no recalls ever issued applicable to the vehicle. Rather, it stated that no open recalls were reported to defendant. And the report also directed potential buyers to check with an authorized Honda dealer for any open recalls. Thus, defendant asserted that the report made no misrepresentations to plaintiff. Further, defendant asserted that plaintiff could not establish that he had a right to justifiably rely on statements made in the report, particularly because the report repeatedly stated that it was based only on what was reported to defendant. Insofar as plaintiff sought to allege fraud based on concealment, defendant asserted that plaintiff could not show there was a fiduciary relationship between the parties or any other basis for finding a duty arose requiring defendant to disclose information to plaintiff.

Defendant further contended that plaintiff could not establish the existence or breach of any contract or contract damages, emphasizing that plaintiff did not set forth the terms of any contract between the parties or any consideration. To the extent that plaintiff alleged that the vehicle history report constituted a contract between the parties, he failed to allege the terms of any agreement and consideration, and he failed to show how defendant breached such agreement. Additionally, plaintiff did not allege that he purchased the vehicle history report from defendant, but rather it was furnished by the used car dealership. Defendant argued the language in the vehicle history report made plain that defendant assumed no contractual obligation to plaintiff at all, let alone a duty to check for recalls, and any failure to check for recalls could not constitute a breach. As for damages, defendant asserted that "[n]owhere in his Complaint does Plaintiff allege that the purchase price of the Vehicle was contemplated by the parties if [defendant] did not report recalls as he claims it should have, or that such damages were reasonably foreseeable." Defendant emphasized that plaintiff did not allege defendant sold him the vehicle or that plaintiff purchased the vehicle history report from defendant. Additionally, defendant asserted that plaintiff did not allege that damages for mental or emotional distress were contemplated by the parties as damages recoverable for a breach of contract.

Plaintiff's Motion to Strike

Rather than filing an opposition, plaintiff filed a motion to strike the demurrer on the ground that defendant failed to satisfy the meet-and-confer requirements set forth in section 430.41, subdivision (a). Addressing the merits of the demurrer, plaintiff asserted, in effect, that, because his complaint employed a Judicial Council pleading form, in order to successfully state a cause of action, he merely had to "check[] boxes and fill[] in the facts . . . ."

With regard to the fraud cause of action, plaintiff invoked an exception to the heightened pleading requirement applicable to such causes of action. Plaintiff asserted

that the heightened pleading requirement is not strictly enforced where the allegations indicate that the defendant must necessarily possess the information concerning the facts of the controversy or where the facts lie more in the knowledge of the defendant. Plaintiff asserted that this exception applied here "as to the airbag recalls which has to be a subject of the [vehicle history report] as Defendant . . . has to have been fully knowledgeable about because of its vast resources and obligations . . . ."

As for the breach of contract cause of action, plaintiff asserted: "the [vehicle history report] for the Plaintiff's Honda Pilot vehicle . . . is indeed a contract as it is a defined service of Defendant . . . and its ground on that basis for its demurrer must fail as all other elements of" plaintiff's breach of contract cause of action "have also been well pled."

Declaration Submitted by Defendant Regarding Meet-and-Confer

Defendant submitted a declaration of Shaina Ward, Associate General Counsel for defendant. Ward stated that, prior to filing the demurrer, defendant had conferred with counsel for plaintiff regarding the deficiencies in the complaint and the grounds for defendant's demurrer on "at least three separate occasions." According to Ward, she spoke with plaintiff's attorney by telephone on September 20, 2018, and she sent a follow-up e-mail on the same day. On November 1, 2018, she spoke with plaintiff's attorney by telephone again. Finally, on November 5, 2018, Ward spoke with plaintiff's attorney, and, on this occasion, plaintiff was present. Defendant filed the demurrer on November 14, 2018.

Order, Judgment, and Appeal

In an order after hearing on demurrer, the trial court sustained the demurrer without leave to amend on the grounds that the complaint failed to state facts sufficient to constitute a cause of action. In a judgment of dismissal entered upon the order, the trial court dismissed plaintiff's complaint.

Plaintiff timely appealed. In his notice designating record on appeal, plaintiff indicated that he chose to proceed without a record of the oral proceedings in the trial court, thereby acknowledging that, "without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in deciding whether an error was made in the superior court proceedings."

DISCUSSION

I. Meet-and-Confer

A. Section 430.41, Subdivision (a)

Section 430.41, subdivision (a), sets forth a meet-and-confer process a demurring party must engage in with the plaintiff prior to filing a demurrer. However, subdivision (a)(4) plainly states: "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer."[3]

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[3] Section 430.41, subdivision (a), provides: "(a) Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading. [¶] (1) As part of the meet and confer process, the demurring party shall identify all of the specific causes of action that it believes are subject to demurrer and identify with legal support the basis of the deficiencies. The party who filed the complaint, cross-complaint, or answer shall provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. [¶] (2) The parties shall meet and confer at least five days before the date the responsive pleading is due. If the parties are not able to meet and confer at least five days prior to the date the responsive pleading is due, the demurring party shall be granted an automatic 30-day extension of time within which to file a responsive pleading, by filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer. The 30-day

B. Plaintiff's Contentions

Plaintiff asserts defendant failed to comply with the meet-and-confer requirements of section 430.41, subdivision (a), and that the demurrer should have been overruled as a result. Plaintiff further asserts that the trial court ignored his motion to strike the demurrer on this ground. Because defendant failed to comply with the requirements of section 430.41, plaintiff asserts reversal is warranted. We disagree. Plaintiff has failed to provide a record showing exactly what the court considered, and in any event, the demurrer was properly sustained.

C. Analysis

1. Trial Court's Consideration of Plaintiff's Section 430.41 Contentions

Defendant asserts that, contrary to plaintiff's contention, it engaged in good faith and sufficient efforts to meet and confer with plaintiff. Defendant relies on Ward's declaration, in which she stated that she conferred with plaintiff's attorney on multiple occasions regarding the deficiencies in the complaint and the grounds for defendant's demurrer. According to defendant, plaintiff does not dispute the occurrence of these exchanges.

In his reply brief, plaintiff asserts that the trial court did not consider Ward's declaration in making its determination, and that plaintiff "was not given any opportunity to be heard on the inaccuracies of the Ward submission." Moreover, according to

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extension shall commence from the date the responsive pleading was previously due, and the demurring party shall not be subject to default during the period of the extension. Any further extensions shall be obtained by court order upon a showing of good cause. [¶] (3) The demurring party shall file and serve with the demurrer a declaration stating either of the following: [¶] (A) The means by which the demurring party met and conferred with the party who filed the pleading subject to demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer. [¶] (B) That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith. [¶] (4) *Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer*." (Italics added.)

plaintiff, the court did not even consider the requirements of section 430.41, subdivision (a). Without benefit of a reporter's transcript or settled statement to support his contention, plaintiff asserts that the court stated at the hearing: " 'I don't have to comply with the "meet and confer" pleading requirements.' " Thus, according to plaintiff, the trial court "ignored and did not act on" plaintiff's motion to strike the demurrer.

Plaintiff's failure to provide a reporter's transcript is fatal to the arguments he makes here. " 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters *as to which the record is silent*, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*), italics added.) "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) "A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.)

An adequate record includes a reporter's transcript prepared at the appellant's expense if the appellant "intends to raise any issue that requires consideration of the oral proceedings in the superior court . . . ." (Cal. Rules of Court, rules 8.120(b) & 8.130(b); see *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186 (*Foust*).) Where no reporter's transcript is available, an appellant may submit an agreed statement or a settled statement summarizing the bases on which the superior court decided the points to be raised on appeal. (*Foust*, at p. 186; Cal. Rules of Court, rules 8.134 & 8.137.) " 'Failure to provide an adequate record on an issue requires that the issue be resolved against [the] [appellant].' " (*Foust*, at p. 187, quoting *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

The record on appeal here consists only of the clerk's transcript. In his notice designating record on appeal, plaintiff elected to proceed without a record of the oral proceedings, acknowledging that "without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in deciding whether an error was made in the superior court proceedings." The trial court's order in the clerk's transcript does not address the meet-and-confer requirements in section 430.41, subdivision (a), whether defendant satisfied them, and whether the court considered these matters. The parties seem to agree that the matter was discussed at oral argument before the trial court. However, there is no record of those proceedings before us and thus no record of exactly what was said. As a result, we cannot determine that the trial court did not consider plaintiff's motion to strike the demurrer, whether the court considered Ward's declaration, or that plaintiff was not afforded an opportunity to contest the facts stated in that declaration. Thus, any issue as to the trial court's consideration at the hearing of Ward's declaration and plaintiff's motion to strike must be resolved against plaintiff. (*Foust, supra,* 198 Cal.App.4th at pp. 186-187) The trial court's determination on these matters, on which the record is silent, is presumed correct. (*Denham, supra,* 2 Cal.3d at p. 564.) Accordingly, inasmuch as plaintiff asserts reversal is warranted because the trial court failed to consider the adequacy of Ward's declaration and ignored his motion to strike, his claim fails.

2. Failure to Comply with the Section 430.41, Subdivision (a), Meet-and-confer Requirements

Defendant argues that under section 430.41, subdivision (a)(4), any determination that the meet-and-confer process was insufficient is not grounds to overrule a demurrer. Defendant's position is that, even if its meet-and-confer attempts were inadequate, which they were not, this would not be a basis to overrule the demurrer.

Plaintiff counters in reply that the trial court did not make any determination as to whether the meet-and-confer process was insufficient, as it ignored his motion to strike.

Of course, for the reasons discussed *ante*, we can make no determination in plaintiff's favor on that issue in the absence of a reporter's transcript of the oral proceedings before the trial court or a settled statement. Plaintiff further contends defendant's position—that the failure to comply with the meet-and-confer requirement has no bearing on whether a demurrer may be sustained—would render section 430.41, subdivision (a), and the meet-and-confer requirement meaningless.

The language of section 430.41, subdivision (a)(4), controls. "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." (§ 430.41, subd. (a)(4).) That provision means what it says.

At oral argument, counsel for plaintiff asserted that subdivision (a)(4) of section 430.41 has no bearing on situations where there has been no meet-and-confer. According to counsel, it only applies when there has been a meet-and-confer but there is a disagreement as to the sufficiency thereof. We disagree.

Two decisions have recently made clear that the failure to meet-and-confer is not grounds for overruling or striking a demurrer. As another panel of this court stated: "*[S]ection 430.41 does not contain any penalties for the failure to follow the meet-and-confer process set forth in subdivision (a)(1)*. Indeed, subdivision (a)(4) of that section provides that '[a]ny determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer.' Thus, even if the [defendant] did not comply with the meet-and-confer requirements, we do not agree with plaintiffs that the consequence of that failure is for the court to lose jurisdiction over the pleadings." (*Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 515 (*Olson*), italics added.) In *Olson*, there was no meet and confer because the plaintiffs refused to meet with the defendant's counsel as he had not been formally appointed by the defendant district's board. (*Id*. at pp. 509-510.)

In *Dumas v. Los Angeles County Bd. of Supervisors* (2020) 45 Cal.App.5th 348 (*Dumas*), a case decided by Division Four of the Second District, counsel for the defendant county described sending appellant a written meet-and-confer request but receiving no response. (*Id.* at p. 355.) The plaintiff contended on appeal the written request did not satisfy section 430.41's requirement of a meeting "in person or by telephone." (*Dumas*, at p. 355.) Relying on *Olson, supra*, 33 Cal.App.5th at page 515, the *Dumas* court held: "Nothing in the text of section 430.41, subdivision (a)(4), conditions its operation on compliance with other provisions. To the contrary, it instructs that '[a]ny' determination that the process was insufficient will not be grounds to overrule the demurrer. [Citations.] Accordingly, the trial court did not err in sustaining the demurrer." (*Dumas*, at pp. 355-356, citing § 430.41, subd. (a)(4), fns. omitted.) In addition to relying on this court's opinion in *Olson*, the *Dumas* court also relied on a widely recognized treatise, which states: "CCP § 430.41 contains no provision for compelling compliance with the meet and confer requirement, unlike the meet and confer requirement in the discovery process [citation]. Additionally, the failure to sufficiently meet and confer is not grounds to overrule or sustain a demurrer." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 7:97.27.)

We conclude that, even if defendant did not comply with the meet-and-confer requirements of section 430.41, subdivision (a), any such noncompliance provided no basis to overrule defendant's demurrer in the trial court and provides no basis to reverse the judgment on appeal.

II. The Sufficiency of the Complaint

A. Plaintiff's Contentions and Standard of Review

Plaintiff asserts that the trial court erred in sustaining the demurrer on the ground that his complaint failed to state facts sufficient to constitute a cause of action. (§ 430.10, subd. (e).)

A demurrer tests the sufficiency of the complaint as a matter of law, and it raises only questions of law. (§ 589, subd. (a); see also § 430.30, subd. (a) ["When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading"].) "We review a trial court's decision to sustain a demurrer for an abuse of discretion." (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1014, 1019.) " ' " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the [complaint] a reasonable interpretation, reading it as a whole and its parts in their context." ' " (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1251-1252 (*Finch Aerospace Corp.*).) "[T]he complaint must be liberally construed and survives a general demurrer insofar as it states, however inartfully, facts disclosing some right to relief." (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22; see also *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162 [we decide "whether a cause of action has been stated under any legal theory when the allegations are liberally construed"].)

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment. The plaintiff bears the burden of proving an amendment could cure the defect." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162 (*T.H.*).)

B. Fraud Cause of Action

1. Elements of Fraud

"The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud

(i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 (*Alliance Mortgage Co.*).) (Capitalization omitted.) As we will discuss, we conclude plaintiff failed to plead facts sufficient to establish false representation or concealment and justifiable reliance.

2. Misrepresentation

a. False Representation

As stated *ante*, the vehicle history report attached to the complaint stated: "This CARFAX Vehicle History Report is based only on information supplied to CARFAX and available as of 12/19/16 at 5:57:36 PM (EST). Other information about this vehicle, including problems, may not have been reported to CARFAX." In a portion of the report explicitly addressing recalls, the report stated: "No open recalls reported to CARFAX. Check with an authorized Honda dealer for any open recalls." It also indicated that, during the ownership of the two previous owners, there were no recalls reported.

In his fraud cause of action, plaintiff alleged that the vehicle history report stated that there had been "no open Honda manufacturer airbag recalls reported to defendant." (Capitalization omitted.) However, as the sole grounds establishing that defendant's representation was false, plaintiff further alleged that Honda had, in fact, issued two airbag recalls applicable to the vehicle prior to the time the vehicle history report was prepared. In his attachment seeking exemplary damages, plaintiff similarly alleged that defendant "caused to be prepared a vehicle history report. . . [which] intentionally misrepresented and concealed that there were no recalls by Honda for the vehicle's defective . . . airbags and for which there had actually been two . . . ." Plaintiff did not allege anywhere in his complaint that recalls had been reported to defendant; nor did he state facts sufficient to establish that defendant was otherwise aware of the recalls.

Plaintiff's allegation that Honda had issued two airbag recalls does not support his allegation that defendant misrepresented the vehicle history of recalls. Defendant

represented only that no open recalls had been reported to it. It did not represent that Honda had not issued any airbag recalls.

Accordingly, we conclude that plaintiff has failed to sufficiently plead intentional or negligent misrepresentation.

b. Concealment

Defendant asserts that, inasmuch as plaintiff alleges a claim of fraud by concealment, the pleading must fail. " '[T]he elements of a cause of action for fraud based on concealment are: " '(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " ' " (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 310-311 (*Bigler-Engler*).) " 'There are "four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." ' [Citation.] Where . . . a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply. These three circumstances, however, 'presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.' [Citation.] 'A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as " 'seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.' " ' " (*Id.* at p. 311.)

We do not delve into detail here, as plaintiff has not addressed these issues in his briefing. It is sufficient to say that, beyond checking the box stating that "defendant was bound to disclose," plaintiff has not alleged facts supporting the premise that defendant had a duty to disclose facts to him or the basis for any such duty. (See generally *Finch Aerospace Corp., supra,* 8 Cal.App.5th at p. 1252 [we " ' " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law' " ' "].) He has not alleged the existence of any relationship that could give rise to a duty on the part of defendant to disclose information to plaintiff. (See generally *Bigler-Engler, supra,* 7 Cal.App.5th at p. 311.)

3. Justifiable Reliance

"Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." (*Alliance Mortgage Co., supra,* 10 Cal.4th at p. 1239.) " 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' " (*Ibid.*) " 'However, whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' " (*Ibid.*)

Plaintiff's complaint did not contain facts supporting reasonable or justifiable reliance. Apart from the fact that the vehicle history report stated only that no open recalls had been reported to defendant, the report expressly told plaintiff not to rely on it. The report advised: "Check with an authorized Honda dealer for any open recalls."

This is a case where we may decide, as a matter of law, that " 'reasonable minds can come to only one conclusion based on the facts.' " (*Alliance Mortgage Co., supra,* 10 Cal.4th at p. 1239.) Plaintiff's claim is that he was harmed because he purchased a vehicle that, unbeknownst to him, was subject to two airbag recall notices. But plaintiff

could not have altered his legal position, by purchasing the vehicle under the misperception that it was not subject to any recalls, in *reasonable or justifiable* reliance on the language in the vehicle history report.

In light of the foregoing provisions in the vehicle history report, plaintiff cannot establish reasonable or justifiable reliance on defendant's representations.

4. Conclusion on Fraud Claim

Because the allegations in the complaint did not establish intentional/negligent misrepresentation or concealment, or justifiable reliance, plaintiff has not stated a cause of action for fraud. Thus, the trial court did not abuse its discretion in sustaining the demurrer to plaintiff's fraud cause of action on the ground that the fraud claim does not state facts sufficient to constitute a cause of action. (§ 430.10, subd. (e).)[4] Further, considering the record before us and plaintiff's contentions in his opening brief on appeal, we conclude that plaintiff has not established he could cure the defects in his fraud cause of action by amendment. (*T.H.*, *supra*, 4 Cal.5th at p. 162 [plaintiff bears the burden of proving an amendment could cure the defect].) Accordingly, we conclude that the trial court did not abuse its discretion in sustaining the demurrer to plaintiff's fraud cause of action without leave to amend.

C. Breach of Contract Cause of Action

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) To prove breach, the plaintiff is required to prove

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[4] Because we have determined plaintiff failed to state facts sufficient to establish misrepresentation or concealment and justifiable reliance, we need not address defendant's additional contention that the judgment should be affirmed based on plaintiff's failure to satisfy the heightened pleading requirements applicable to a fraud cause of action.

that the defendant failed to do something the contract required the defendant to do, or the defendant did something that the contract prohibited the defendant from doing. (See *Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 553, fn. 3; CACI No. 303.)

In his opening brief, plaintiff asserted: "[Defendant] bases its demurrer to [plaintiff's] Breach of Contract . . . Cause of Action on the ground that it is deficient as to that standard for express contract actions in terms of essential elements that must be pled. However, what [plaintiff] actually pled was an implied-in-fact contract between" the parties "that created an obligation between them based on the facts of the situation, all as alleged." This was the full extent of plaintiff's argument on the breach of contract cause of action.

Plaintiff's characterization of his pleading is wrong. He did not allege the existence of an implied-in-fact contract. He alleged that the vehicle history report constituted an agreement between the parties. In filling out the Judicial Council complaint form, he alleged that, on December 20, 2016, a "vehicle history report agreement was made between" the parties. Plaintiff's position is untenable. Defendant furnished the vehicle history report to the used car dealership World Famous Autos. Plaintiff is not named in the vehicle history report and he was not a party to whatever agreement defendant had with World Famous Autos.

There are circumstances where a nonparty to a contract may enforce the contract. "A third party beneficiary may enforce a contract made expressly for his or her benefit. [Citations.] It is also true that a party not named in the contract may qualify as a beneficiary under it where the contracting parties must have intended to benefit the unnamed party and the agreement reflects that intent. [Citation.] The party claiming to be a third party beneficiary bears the burden of proving that the contracting parties actually promised the performance which the third party beneficiary seeks. This remains largely a question of interpreting the written contract." (*Sessions Payroll Management v.*

Noble Constr. Co. (2000) 84 Cal.App.4th 671, 680.) However, plaintiff pleaded no facts concerning a contract between defendant and World Famous Autos, that he was a third party beneficiary to that contract, or the necessary bases giving rise to his status as third party beneficiary.

Moreover, the vehicle history report itself is not a contract. It largely describes the vehicle's maintenance, registration, and inspection history, and furnishes information such as odometer readings, accident and damage history, and manufacturer recalls. The vehicle history report does not purport to memorialize an agreement between any parties.

Plaintiff's contention that his breach of contract cause of action alleged breach of an implied contract appears, on this record, to be raised for the first time on appeal. Generally, issues raised for the first time on appeal which could have been but were not litigated in the trial court are forfeited. A reviewing court will ordinarily not consider such claims. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1398-1399.) However, appellate rules do not prohibit a plaintiff from indicating how a complaint could be amended in its opening brief. (§ 472c, subd. (a) ["When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made"]; see also *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 668 ["While it is the plaintiff's burden to show 'that the trial court abused its discretion' and 'show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading' [citation], a plaintiff can make 'such a showing . . . for the first time to the reviewing court"].) Because we must consider whether the plaintiff could cure any defects by an amendment when a demurrer has been sustained without leave to amend (*T.H., supra,* 4 Cal.5th at p. 162), we will consider plaintiff's implied contract contention as supporting a proposed amendment, and address the merits.

"An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, § 1621.) "Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties." (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636, citing *Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 & 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 102, p. 144.) " '[T]he vital elements of a cause of action based on contract are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration. As to the basic elements, there is no difference between an express and implied contract. While an express contract is defined as one, the terms of which are stated in words [citation], an implied contract is an agreement, the existence and terms of which are manifested by conduct [citation]. … [B]oth types of contract are identical in that they require a meeting of minds or an agreement [citation]. Thus, it is evident that both the express contract and contract implied in fact are founded upon an ascertained agreement or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established.' "[5] (*Pacific Bay Recovery, Inc. v. California Physicians' Services, Inc.* (2017) 12 Cal.App.5th 200, 215-216.)

In his reply brief, plaintiff asserts that the parties had an implied-in-fact contract "because the Honda Pilot vehicle [plaintiff] purchased was the subject of a Vehicle History Report . . . prepared by" defendant "during the course of its work for purchasers of used motor vehicles." But defendant merely provided a vehicle history report to World Famous Autos.

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[5] Plaintiff appears to have signed the report. However, that signature only indicates: "I have reviewed and received a copy of the CARFAX Vehicle History Report for this 2006 HONDA PILOT vehicle . . . , which is based on information supplied to CARFAX and available as of 12/19/16 at 5:57 PM (EST)."

Based on the vehicle history report and plaintiff's allegations, no contract can possibly be implied between the parties based on defendant's conduct. There is nothing in this record to suggest that defendant had any interaction with plaintiff, or indeed was aware of plaintiff's existence. Thus, the vehicle history report does not contain any indication of mutual assent. Nor does plaintiff state facts sufficient to establish mutual assent, implied or otherwise, through any conduct outside of defendant's furnishing of the vehicle history report to the dealership. Not only is there an absence of facts sufficient to establish mutual assent, there are no allegations establishing defendant's breach of such a contract, or of compensable contract damages. (See generally *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515 [contract damages "seek to approximate the agreed-upon performance" and "are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time"].) The existence of an implied-in-fact contract between plaintiff and defendant is simply not supported by allegations in the complaint. And plaintiff has not shown how he can amend his complaint to correct this defect. (*T.H., supra,* 4 Cal.5th at p. 162 [plaintiff bears the burden of proving an amendment could cure the defect].)

Because plaintiff failed to state facts sufficient to allege the existence of a contract between the parties, the trial court did not abuse its discretion in sustaining the demurrer to plaintiff's breach of contract cause of action on the ground that the claim does not state facts sufficient to constitute a cause of action. (§ 430.10, subd. (e).)

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/s/
MURRAY, Acting P. J.

We concur:

/s/
RENNER, J.

/s/
BUTZ, J.*

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.